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entire question between private rights and legislative powers, one of quantity and of degree.¹⁵

The principal case is a marked departure in the direction of a clearer enunciation of the true meaning of the "due process" clauses of the constitution. Under its authority there can be no compromise between the constitutional language and the legislative redistribution of economic advantage. Not through a drifting transformation of social ideas, but by the self-conscious process of amendment, must such an end be achieved.

Should the amending power be confronted with such a program, the facts of the principal case would suggest a pertinent inquiry, whether legislative "equalization" may not mean the substitution of a different and perhaps more oppressive inequality.

LOST CERTIFICATES OF DEPOSIT.

Shall the owner of a lost certificate of deposit payable to the order of self and claimed by him not to have been indorsed be compelled to give a bond of indemnity to the bank before being entitled to receive the money on the certificate which had not matured when lost, but had matured before time of the trial?

This question arose in the case of the *German National Bank v. Moore*,¹ and was answered in the negative. The facts of the case were briefly these. The defendant in error, Moore, deposited at the bank the sum of \$4,000 and received a certificate of deposit in this form.

"R. H. Moore has deposited with us four thousand (\$4000) dollars, payable to the order of self twelve months after date with interest to maturity only. . . . upon the return of this certificate properly indorsed."

When the depositor was about to leave on a journey he took the certificate with him. By an accident it was lost at a railway ticket office and its loss was discovered while Moore was on the train. He immediately wired and wrote the bank about his loss, giving them full particulars. He made an unsuccessful effort to find the certificate. After the certificate became due, he demanded payment of the bank, but the latter refused unless the depositor would furnish an indemnity bond. This Moore was unable to do. Moore testified that the certificate was unindorsed

¹⁵ See *Noble State Bank v. Haskell*, *supra*, 110.

¹ 173 S. W. (Ark.) 401.

at the time he lost it. On this point there was no other evidence. The court held that the question whether Moore should be compelled to give an indemnity bond is one addressed to the sound discretion of the court, and that under these circumstances, he did not have to furnish an indemnity bond.

Was the court right in so deciding? The answer to this question depends in turn on another question. "Is the fact that the certificate was unindorsed *res adjudicata* against the whole world?" The case of the *First National Bank of Denver v. Wilder*² was very similar to the principal case in its facts. In the course of its opinion the court said: "The finding of the jury that the certificate was unindorsed by the payee rests upon fallible human testimony which might be discredited by another jury called to determine this same issue in a suit by a third party against the defendant on the certificate." This finding would neither operate as an estoppel nor would it even be admissible in evidence in a suit by a third party against the defendant. Continuing, the court said: "No prudent banker on the facts disclosed by the record would pay the certificate voluntarily without proper indemnity; and what a prudent man would not do voluntarily, surely a court should not compel the defendant bank to do. . . . Reasonable security against its further appearance should be required unless the proof that the paper has been actually destroyed is so cogent that there is practically no risk of its reappearance." The person who has lost a negotiable instrument or certificate of deposit which has the same characteristics as a negotiable note, should not be allowed to cast the burden of his misfortune upon the bank, but should be compelled to tender a reasonable indemnity. There is no conflict of authority on the requirement of the indemnity bond when the instrument lost before maturity is negotiable, and is payable to bearer on its face, or by reason of a blank endorsement.³

Certainly whatever possibility of damage there is ought to be borne by the owner of the lost instrument rather than by the bank. As long as there is a possibility that the certificate was indorsed, then the bank should be protected from every single

² 104 Fed. 187.

³ *Hedricks v. White Cotton*, 60 Mo. App. 171; *Hinckley v. Union Pacific R. R.*, 129 Mass. 52; *Kirkwood v. Bank*, 40 Neb. 484; *Wiedenfeld v. Galagher*, 24 S. W. (Tex.) 333; *Bridgeport v. Mason Co.*, 34 Conn. 546; *Schmidt v. Bank*, 153 Mass. 530; *Lodge v. Bank*, 7 Pa. Sup. Ct. 552; *Pierson v. Hutchinson*, 2 Camp. 211; *Ex parte Greenway*, 6 Vesey, Jr. 812.

avenue of liability. It has done nothing to be placed in a position which may ultimately result in a loss. As between the plaintiff who lost possession of the instrument and the defendant bank, it is but fair that the former should bear the burden of possible future demands predicated by others upon the instrument.

In the case of *Bank v. Brown*,⁴ where a similar question was involved, the majority held that a bond was not necessary. The dissenting opinion on this point said: "Nor can the case of the defendant be maintained upon the claim and finding that the certificate was unindorsed at the time of the alleged loss. The record in this case binds none but the parties to it. It is possible that the certificate may have been indorsed for value by the payee before the loss. But even if not indorsed by his genuine signature heretofore, it is possible to be put on hereafter; and even upon a forged indorsement, the bank could be put to the trouble and expense of defending an action with the possibility and risk of an erroneous finding of the fact against it.

Great weight should be placed upon the fact that the finding of the jury in the principal case binds only the parties to the suit and not the outside world. It is not *res adjudicata* against the whole world. When the plaintiff Moore, in the principal case, testified, he had his own pecuniary interest at stake. He was the person most vitally interested in the result. He testified that the instrument was unindorsed. Assuming that he was honest, this was at most only his opinion or recollection. But there still remains the possibility that it was not unindorsed and that the plaintiff was honestly mistaken when he testified. Frequently in a case two people testify diametrically opposite on the same subject matter and both do so in good faith. Suppose two years after the bank has paid the certificate without an indemnity bond, Moore should become a bankrupt and be out of the jurisdiction. Let us also assume that the instrument turns up with an "indorsement" upon it. What is the result? The bank makes an effort to defend, and what testimony has it to rebut this "indorsement?" It cannot introduce the judgment in the previous case. And if it is unable to find the plaintiff Moore, then it has absolutely no means to defend the second suit, and it is compelled to pay twice because of the fault of another in no way attributable to itself. And even if it succeeds in defending, it must suffer loss of time, attorney fees, and receive in the community the reputation of

⁴ 45 Oh. St. 39.

resisting an honest claim. It is against such results that the bank ought to be protected.

The case of *Zander v. New York Trust Co.*⁵ is different from the principal case in one very important respect. In that case, the certificate of deposit was payable to Zander and "*her assigns, on return of this certificate, which is assignable only on the books of the company.*" The court held that this certificate was non-negotiable and that the bank would be protected in paying the depositor without requiring an indemnity bond because payment before notice of assignment would be a defense against an assignee. But in the principal case, the possibility that the instrument was indorsed and in the hands of a holder in due course still existed.

In the case of *Matthews v. Matthews*,⁶ involving a similar question, the court said: "While the proof is sufficient to authorize a finding in the plaintiff's favor, it is not to be assumed conclusively that the note will never appear and that the defendant will be subjected to no further risk, loss or expense on account of it. . . . The plaintiff should be defaulted for the amount of the note in suit, and the case continued for judgment from term to term until the note is barred by the statute of limitations, or until the plaintiff furnishes the defendant such indemnity as the court shall order and determine."

It must be conceded that there are many cases which hold that in a case like the principal case the plaintiff need give no bond of indemnity.⁷ The argument that an instrument payable to order and "not indorsed," will cause the bank no harm is founded on a fallacy. It assumes as an absolute fact and one that cannot be disputed by another party in another proceeding that the certificate was unindorsed. But the lack of indorsement is not a fact which is *res adjudicata* against the whole world. Nor can the court know that it is an absolute fact, for it has only the testimony of the party most vitally interested in the result.

⁵ 178 N. Y. 208.

⁶ 97 Me. 40.

⁷ *Mossop v. Eadon*, 16 Vesey, Jr. 430; *Warner v. Bailey*, 10 A. & E. 616; *Bank v. Tillman*, 12 Ala. 214; *McMillan v. Bethold*, 35 Ill. 254; *Bank v. Brown*, 45 Oh. St. 39; *Bank v. Ruyel* ("payable in currency held to be non-negotiable"), 51 Ind. 393; *Kirkwood v. Bank*, 40 Neb. 484; *Palmer v. Carpenter*, 53 Neb. 394; *Abone v. Bosworth*, 1 R. I. 40; *Mackey v. Mackey*, 16 Colo. 134.

This matter of indemnity bonds is one that is regulated in some states by statute. Some of them cover instruments negotiable in their origin and some where the instrument is non-negotiable and some where the instrument continues negotiable.⁸

It may be that the cost of a surety bond for the period fixed by the statute of limitations would be fairly expensive, but when compared with the \$4000 is relatively small. The parties are then fully protected. According to the *Matthews v. Matthews*⁹ case, the money might be paid into court and by it deposited in several banks. This sum will draw interest, which could accumulate and so save the plaintiff interest, especially since the deposit did not bear interest after twelve months.

It would seem, then, that the principal case is wrong.

⁸ New York, Missouri, California, Massachusetts, Alabama, Maryland.

⁹ 97 Me. 40.